IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-648

IN THE MATTER
OF
FRED G. MORITT,

Appellant,

-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT, COUNTY OF KINGS, HON. JOHN M. MURTAGH, as Presiding Justice of the Extraordinary Special and Trial Term, HON. MAURICE H. NADJARI, as Special Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

On Appeal From The Supreme Court Of The State Of New York, Appellate Division, Second Judicial Department

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered December 27th, 1974, which dismissed on the merits a petition in a proceeding under Article 78 of the New York Civil Practice Law and Rules to prohibit the prosecution of appellant, and drawing into question the validity of Section 149 subd. 1 and 2 of the Judiciary Law of the State of New York, and Article 6, Sect. 27 of the New York State

Constitution, as repugnant to the Constitution of the United States.

An appeal therefrom taken as of right on constitutional grounds, to the Court of Appeals of the State of New York, was filed on January 9th, 1975, pursuant to Article 6, Sec 3(b) New York State Constitution, and New York Civil Practice Law and Rules 5601(b) (App B). On June 4th, 1975, the appeal was dismissed upon the stated ground that "no substantial constitutional question is directly involved" (App A).

On September 10, 1975, the said Court entered an order denying reargument thereon, and on the same date, entered an order denying appellant's application for permission to appeal from the final judgment of the Appellate Division aforesaid (App A).

No opinion was rendered either by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, or by the New York Court of Appeals.

An amended notice of appeal was filed in the Appellate Division, Second Judicial Department, Supreme Court of the State of New York on September 29, 1975. (App A).

Appellant respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal constitutional questions are herein presented.

JURISDICTION

The jurisdiction of the Supreme Court to review this final judgment by direct appeal is conferred by Title 28 United States Code Sec. 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court herein:

As to the separation of powers and independence of the judiciary: *United States v. Brown*, 381 U.S. 437 (1965);

O'Donohue v. United States, 289 U.S. 516, 513; *Dreyer v. Illinois*, 187 U.S. 71, 84; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 633 (1952); *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880); *Springfield v. Philippine Islands*, 277 U.S. 189, 201 (1928); *Montana Co. v. St. Louis Mining & Co.*, 152 U.S. 160, 169 (1894); *In Re Murchison*, 349 U.S. 133 (1965); *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court*, 220 N.Y. 487, 116 N.E. 384, per Judge Cardozo; *Matter of Reynolds v. Cropsey*, 241 N.Y. 389, 395, 150 N.E. 303; *Stuart v. Palmer*, 74 N.Y. 183, 189).

As to denial of procedural due process of law and the equal protection of the laws: *Long v. District Court of Iowa*, 385 U.S. 192; *Lane v. Brown*, 372 U.S. 477; *Douglas v. California*, 372 U.S. 353; *Gideon v. Wainwright*, 372 U.S. 335; *Griffin v. Illinois*, 351 U.S. 12; *Roller v. Holly*, 176 U.S. 398, 409; *Coe v. Armour*, 237 U.S. 413, 424-5; *Malinski v. New York*, 324 U.S. 401, 419; *Field v. Boyle*, 503 F.2d (CA 7, 1974); *Wong Young Sung v. McGrath*, 339 U.S. 33, 50 (1950); *Burgett v. Texas*, 389 U.S. 109 (1967).

As to the ex post facto prosecution: *Vick Wo v. Hopkins*, 118 U.S. 356, 373-4; *Watson v. Buck*, 313 U.S. 387; *Nashville C & St. L. Ry. v. Walters*, 294 U.S. 405; *Hill v. State of Texas*, 316 U.S. 400; *City of St. Petersburg v. Alsup*, 238 F. 2d 830, cert. den. 353 U.S. 922; *Williams v. United States*, 179 F2d 644, aff. 341 U.S. 70; *Love v. Fitzharris*, 460 F.2d 382, vacated 409 U.S. 1100; *Matter of Spindell*, New York Supreme Court (*New York Law Journal*, June 3, 1974).

Statutes Involved

The state statutes involved, set forth in the appendix, are as follows: Section 149, subd. 1 and 2, Judiciary Law of the State of New York; Article 6, Section 27 New York State Constitution; Section 63 Executive Law of the State of New York, as applied; Article 6, Sec. 28 New York State Constitution; Section 212 Judiciary Law of the State of New York, as applied.

Questions Presented

1. Is a state statute and constitutional provision, authorizing the governor to create and appoint an extraordinary term of the supreme court and to designate the special justice who shall preside therein—and further empowering the governor to terminate the assignment of such justice at will, and at any time, and to designate another justice in his place—facially violative of the independence of the judiciary and the Separation of Powers guaranteed against encroachment by the 5th and 14th Amendments of the Constitution?

2. Is a state statute which substantially diminishes the substantive procedural rights of all litigants in the appellee Extraordinary Term Court, by requiring that all preliminary motions and pre-trial proceedings be brought exclusively in such court, before a judge specially designated by the Governor, and summarily removable at the will, whim or caprice of the Governor, and which further prescribes that in the alternative, in the exercise of discretion by a justice of the appellate division of the Supreme Court, such pre-trial motions may be entertained by the appellate division, facially violative of the equal protection of the laws guaranteed under the 5th and 14th amendments of the Constitution, as compared to the unrestricted pre-trial procedural rights accorded all other litigants in the regular criminal terms of the Supreme Court?

3. Where a state statute expressly requires that the independently-elected constitutional office of the Attorney General of the State of New York appear in person, or by one of his deputies, before the Extraordinary Term of the Supreme Court to manage and conduct all proceedings therein, may the Governor constitutionally dictate the choice and personally designate a special prosecutor to manage and conduct all proceedings in the appellee Extraordinary Term of the Supreme Court, particularly where the presiding justice thereof was likewise personally designated by and was summarily removable at will by the Governor?

4. Is a state prosecution void as *ex post facto*, where it intrudes into the special relationship and personnel practices between a judge and his lawfully appointed personal assistant exclusively within the jurisdiction, domain and supervision of the administrative board of the state's unified court system, as specifically mandated by the state statute and the New York State Constitution, upon which appellant and all other judges within the state's unified court system have traditionally relied?

Statement

On September 19th, 1972, the Governor of the State of New York issued Executive Order No. 58 (App. B), (9 Official New York Codes, Rules and Regulations, Sec. 1.58) pursuant to the authorization of Section 149 of the Judiciary Law of the State of New York and Article 6, Section 27 of the New York State Constitution, and Section 63 of the Executive Law of the State of New York, establishing an extraordinary special and trial term of the Supreme Court in and for the County of Kings of the State of New York, requiring the selection of a special grand jury for said term, and directing the appellee Attorney General of the State of New York, in person or by one of his deputies, to investigate and prosecute all corrupt acts committed by public servants arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York." (App. B)

On October 13th, 1972, the Governor issued Executive Order 64 (App. B) (9 N.Y.C.R.R. 1.64), designating and appointing the appellee Hon. John M. Murtagh, a Justice of the Supreme Court of the State of New York, to preside over the Extraordinary Special and Trial Term for the County of Kings and to cause to be drawn a jury to serve the said Term (App. B).

Appellant was a Judge of the Civil Court of the City of New York, having served since 1957 as a member of that Court. His law secretary, officially designated as a personal assistant, was one Theodore Mann, a duly qualified attorney at law, who was appointed on September 1, 1972.

On April 17, 1974, appellee Nadjari filed an indictment in the Extraordinary Special and Trial Term of the Supreme Court, County of Kings, charging appellant with the alleged crimes of conspiracy in the third degree, grand larceny in the second degree, perjury in the first degree and tampering with a witness.

In substance, the conspiracy and grand larceny counts, of which Mr. Mann was separately indicted, was that the latter had "performed little or no work" as law secretary to Judge Moritt from September 18, 1972 to January 24, 1974. The documented facts, however, are that Mr. Mann had regularly performed his duties as law secretary throughout; that in the last week of September 1973, Mr. Mann had been forced to leave for Florida to attend his seriously ill wife who had suffered a paralytic stroke; that appellant Judge Moritt had expressly granted him permission to do so in view of the fact that Mr. Mann had worked during the summer of July and August 1973, while Judge Moritt was on a European holiday, and elected to take his vacation in the Fall of that year.

Under the laws of New York, all personnel practices, including appointments, discharges, leaves of absence, sick leaves, vacation and time allowances, etc., of all non-judicial personnel of New York's unified court system are exclusively controlled and regulated, and are within the sole jurisdiction of the administrative board of the Judicial Conference of the State of New York (Article VI, Sect. 28 of the Constitution of the State of New York; Section 212 Judiciary Law, subd. 1 (App. B).

The conclusive fact is that no rule, regulation or order had been promulgated by the administrative board which did in any way restrict the total and exclusive supervision exercised by the judges over the personnel practices of their law secretaries or clerks within the unified court system of the State of New York. "For the nature of the Secretary's work is wholly defined by the individual Justice, and is to a large extent unrelated to a five-day per week, eight-hour schedule. The Secretary may be as much on the job when at home, actually ill, but reading and evaluating briefs, papers in the court file, decisions and precedents, or

conferring with the Justice by telephone, as when he is physically present in chambers." (*Matter of Spindel v. Dudley*, Supreme Court, New York County, New York Law Journal, June 4, 1974).

As to the baseless perjury and tampering counts, relating to a statement purportedly made by Judge Moritt to Mr. Mann's law clerk, that "defendant swore falsely when he testified that he had at no time told anyone that he knew the names of a half-dozen Judges' secretaries who never report to work", the fact is that it would have been physically impossible for Judge Moritt to have known of his own knowledge whether other judges' secretaries "never report to work." Moreover, no proper foundation had been laid therefor before the grand jury and Judge Moritt's testimony had been wrongfully elicited for the sole purpose of laying the groundwork for a "perjury" prosecution rather than to discover the truth (*Bronston v. United States*, 409 US 352; *United States v. Lardieri*, 497 F.2d 317).

Subsequent to the filing of the indictment, on July 3rd, 1974, pursuant to Section 149, subd 1, Judiciary Law (App. B) appellant was granted the discretionary permission of a Justice of the Appellate Division of the Supreme Court to apply to that Court for pre-trial relief to dismiss the indictment on several constitutional and jurisdictional grounds. Among the relief requested was a motion to dismiss the indictment on the ground of the prosecutorial misconduct of appellee Nadjari in suppressing vital and material evidence before the grand jury which would have completely exonerated appellant of the unfounded charges contained in the indictment. In addition, appellant moved to dismiss the indictment on the ground that the evidence adduced before the grand jury did not constitute a crime.

On November 12th, 1974, the Appellate Division denied the appellant's original application for pre-trial relief, including the aforesaid motions to dismiss the indictment. No oral argument was permitted by the Court although duly requested by appellant. (*Matter of Moritt v. Nadjari*, 46 App. Div. 2d 784 (NY 1974). In its opinion, the Court stated in part:

"In connection with the substantive attack made on the various counts of the indictment, we have examined the Grand Jury minutes. While the theory underlying the charge of grand larceny is thin and the proof in regard thereto quite tenuous, they are nevertheless sufficient to require a denial of the defendant's motion to dismiss.

We have considered the other contentions raised by the defendant and find them to be without merit."

The said order of the Appellate Division was not appealable under New York law.

On November 27th, 1974, appellant moved for re-argument upon the specific ground that the denial on the merits of appellant's petition to dismiss the indictment for gross prosecutorial misconduct, *without a full-scale factual hearing*, and without opportunity to argue, was violative of his right to due process of law, and to the equal protection of the laws. (*Westervelt v. Gregg*, 12 N.Y. 2d 202; *Wong Yong Sung v. McGrath*, 339 U.S. 33; *Burgett v. Texas*, 389 U.S. 109). On December 27th, 1974, the Appellate Division denied re-argument.*

Subsequently, during the pendency of appellant's case before the Extraordinary Term of the Supreme Court, appellant moved the Appellate Division to amend its original order of November 12th, 1974, so as to provide that the denial on the merits, without a hearing, of his motion to dismiss the indictment in that

* Though the Appellate Division had denied appellant's application to dismiss the indictment for gross prosecutorial misconduct shocking to the conscience, without a hearing, a complaint subsequently filed by Judge Moritt under Title 42 USC 1983 for deprivation of civil rights, pleading the identical acts alleged in the state court proceedings hereinabove, was upheld by Chief Judge Mishler in the U.S. District Court for the Eastern District of New York, on Appellee Nadjari's motion to dismiss. (*Moritt v. Nadjari*, et al. __F. Supp.__ August 27, 1975).

Court, be "without prejudice to re-consideration and renewal thereof by the Extraordinary Special and Trial Term of the Supreme Court". On May 14th, 1975, the Appellate Division denied appellant's application to amend.

Subsequently, on January 15, 1975, the Appellate Division denied appellant's motion for renewal and reconsideration of his motions to dismiss the indictment, filed upon the specific documented ground that appellee Nadjari had publicly acknowledged on December 18, 1974 that the employment by a judge of an alleged "no-show" law secretary "did not constitute an indictable crime", and that "we need new legislation for that."

Subsequently, as required by the Criminal Procedure Law of New York, Sec. 255.20, appellant filed a series of omnibus motions in the Extraordinary Term of the Supreme Court as follows: To dismiss the indictment on the ground that Section 149 of the Judiciary Law is inherently void on its face, and Section 63 of the Executive Law, as applied, under the Due Process clause of the Constitution; to dismiss the indictment in the interest of justice for gross prosecutorial misconduct shocking to the conscience violative of due process of law; to dismiss the indictment as unconstitutionally *ex post facto* and selectively discriminatory in nature under the Due Process Clause of the Constitution; to stay all proceedings pending final determination of the constitutional issues raised herein.

Subsequent to the original proceeding instituted in the Appellate Division under Sec. 149 of the Judiciary Law, as aforesaid, on November 25th, 1974, appellant instituted a special proceeding in the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York, for an order under Article 78 of the Civil Practice Law and Rules, to prohibit the appellees from proceeding with the trial of the indictment, and for dismissal of the indictment under the 5th and 14th Amendments of the Constitution of the United States.

and Article 1, Sec. 6 of the New York State Constitution, upon the following grounds:*

1. That the statute under and by which the appellee Extraordinary Special and Trial Term of the Supreme Court was convened, to wit, *Sec. 149, subd. 1 of the Judiciary Law of New York*, is unconstitutional and void on its face, as inherently violative of the independence of the judiciary and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the federal and state constitutions.

2. That the same statute, *Sec. 149 of the Judiciary Law of New York, subd. 2 thereof*, is unconstitutional and void on its face, as inherently violative of appellant's right to procedural due process and to the equal protection of the laws under the Constitution.

3. That the appellee Nadjari, unconstitutionally misapplied the state's penal laws by illegally usurping the exclusive jurisdiction vested in the administrative board of the Judicial Conference of the State of New York over the administrative supervision of the unified court system, as provided in Article 6, Sec. 28 of the New York State Constitution, and Section 212 of the Judiciary Law of the State of New York, rendering the indictment against appellant invalidly retroactive, in violation of the 5th and 14th Amendments and Article I, Sec. 9 of the Constitution of the United States forbidding *ex post facto* enforcement of the criminal laws.**

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* Under New York Law, an Article 78 proceeding is an appropriate vehicle for contesting state action on jurisdictional or constitutional grounds (*Matter of Hogan v. Court of General Sessions*, 296 NY 1, 8; *People ex rel, SI. & T Co. v. Extraordinary Term of Supreme Court* 220 NY 487; *Matter of Reynolds v. Cropsey*, 241 NY 389; *Kovarsky v. Housing & Development*, 31 NY2d 184, 286 N.E.2d 882; *Dunn & Bradstreet, Inc., v. City of New York*, 276 NY 198, 11 N.E.2d 728; *Socha v. Smith*, 24 NY 2d 400; *Civil Practice Law and Rules, Article 78* (McKinney's Consolidated Laws of New York, Book 7B).

** The petition further contended therein that the appellee Nadjari usurped jurisdiction in that his authority to act was strictly limited to the criminal justice system in the City of New York, by the requirements contained in the Governor's Executive Order, and that the acts charged against appellant were in no way connected with the criminal justice system or the enforcement of law. The construction of a state statute is not reviewable in this court (*Guaranty Trust Co. v. Blodgett*, 287 U.S. 509).

The Article 78 proceeding aforesaid was instituted in the Appellate Division as an original proceeding by mandate of New York's Civil Practice Law and Rules, Section 506(b)(1), which requires that an Article 78 proceeding against a respondent Justice of the Supreme Court must be initially instituted in the Appellate Division, rather than in the State Supreme Court.

In support of the petition, appellant submitted a memorandum of law, in opposition thereto, appellee Nadjari submitted a brief two-line affidavit and a memorandum of law on behalf of the respondents named in the petition. The respondents' affidavit merely stated: "Under the facts and circumstances of the case at bar the relief sought is unavailable to the petitioner."

Again, no oral argument was permitted on appellant's Article 78 petition.

In dismissing the petition "on the merits," the Appellate Division rendered no opinion. (App. B).

The Federal Questions are Substantial.

I.

The state statute in issue, Section 149 subd. 1, of the Judiciary Law, and its counterpart, Article 6, Sec. 27 of the New York State Constitution, are on their very face, fundamentally violative of the independence of the judiciary and of the Separation of Powers guaranteed against encroachment by the 5th and 14th Amendments of the Constitution.

In no other instance under the Judiciary Law of the State of

New York is the Governor granted the power to assign and remove a member of the judiciary, even during the same term. In every instance, the judicial prerogative of regular and temporary assignments of Justices to the Supreme Court is vested exclusively in the Appellate Division of the Supreme Court. (Article 6, Sec. 26 New York State Constitution, and Sec. 86-88 incl. Judiciary Law (App. B).

A statute that empowers the Governor to terminate at will the assignment of a judge to preside over a term of court, for any or no reason whatsoever, at any time, unlike the sole and exclusive power vested in the judicial conference to regulate the assignment and replacement of all justices in all other courts, unconstitutionally places the "whole power" of the executive over the independence and tenure of the judiciary. (*Dreyer v. Illinois*, 187 U.S. 71, 84; *People ex rel S.L. & T. Co. v. Extraordinary and Trial Term of the Supreme Court*, 220 NY 487; *Matter of Reynolds v. Cropsey*, 241 NY 389, 395).

A state constitution, no less than a statute, can be attacked for unconstitutionality (*American Federation of Labor v. Watson*, 327 U.S. 582, 592-93; *Driskell v. Edwards*, 518 F 2d 890 (CA 5, 1975); *Matter of Wendell v. Lavin*, 246 NY 115, 123; *People ex rel Jackson v. Potter*, 47 NY 375, 379-380).

The fatal flaw of the statute and constitutional provision in issue is not that the Governor had overtly intruded upon the independence of the judiciary by actual replacement of the appellee presiding judge to do the Governor's bidding, but that in its in-built potential of autocratic control by the Governor inherent in the pervasive power of summary removal of any judge appointed by him, the statute is rendered unconstitutional per se. The very latent power of the Governor to hire and fire a judge puts the executive branch of government implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v. Extraordinary Term*, 220 N.Y. 487, 116 N.E. 384).

In constitutional principle, the constitutionality of a measure depends not on the degree of its exercise, but on its principle (*Providence Bank v. Billings*, 29 U.S. 514). "The constitutional

validity of laws is to be tested, not by what has been done, under it, but by what may, by its authority, be done", (*Stuart v. Palmer*, 74 N.Y. 183, 189; quoted with approval in *Montana Co. v. St. Louis Mining & Co.*, 152 US 160, 169 (1894); *Farmer Grain Co. v. Langer*, 273 F. Rep. 635, 647 (CA 8, 1921).

It matters not that the unfettered power thus vested in the Governor springs from the highest motives in the rooting out of a festering corruption within the criminal justice system. "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*NAACP v. Alabama*, 377 U.S. 288, 307).

That this question is so substantial as to require plenary consideration by the Supreme Court of the United States for its resolution is readily attested by the fact that the state statute in issue is an identical replica of the tyrannical power exercised by King George III over the colonial governments, through his royal governors, by systematically appointing and controlling his own judges and prosecutors. "He has made Judges dependent on his Will alone, for the tenure of their offices, ****" (*Declaration of Independence, July 4, 1776*).

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwalk against tyranny" (*United States v. Brown*, 381 U.S. 437). "*** there is no liberty, if the power of judging be not separated from the legislative and executive powers". (*The Federalist*, No. 78, A. Hamilton, Modern Library ed. P 504). "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." (*Holohan v. United States*, 294 U.S. at p. 113). "*** due process questions under the Federal Constitution may be presented either by the failure of a state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process." (*Field v. Boyle*, 503 F.2d 774 (CA 7, en banc, 1974).

"A fair trial in a fair tribunal is a basic requirement of due

process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (*In Re Murchison*, 349 U.S. 133) "*** every procedure which would offer a possible temptation to the average man as a judge. . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law" (*Tumey v. Ohio*, 273 U.S. 510).

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious." (*United States v. Walker*, 473 Fed. 2d 136, (CA, DC, 1972).

In dismissing the appeal taken as of right under New York law pursuant to Civil Practice Law and Rules 5601(b), on the purported ground that "no substantial constitutional question is directly involved" and in summarily denying the appellant leave to appeal, the Court of Appeals failed to adhere to its standard precedents laid down in its own prior decisions in *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court, supra*, Cardozo, J. and in *Matter of Reynolds v. Cropsey, supra*, construing the very statute here in issue in its preamended form. It was after the Cardozo decision in *Saranac* that the legislature made the statute repugnant to the Constitution by enacting new legislation allowing the Governor to remove as well as appoint the special judge of the Governor's own creation. As so reconstituted, it is self-evident that the legislative authorization granted to the Governor to terminate the assignment of a justice appointed by him at will, would never have survived constitutional muster of the Cardozo court.

With all due deference and the utmost respect for the New York Court of Appeals, a state court cannot so construe a state statute as to render it obnoxious to the Federal Constitution. (*Arizona Employer Liability Cases*, 250 US 400; *Crew Levick Co. v. Comm. of Pa.*, 245 US 292). The Supreme Court of the United States is not bound by the determination of the New York Court of Appeals that the constitutional questions are not

substantial, but must reach a conclusion independent of the state court. (*Appleby v. City of New York*, 271 U.S. 364; *Napue v. Illinois*, 360 US 264; *Brookhart v. Janis*, 86 S. Ct. 1245; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697).

II

In substantially diminishing the rights of litigants before the Extraordinary Term, as compared to all other criminal defendants of the regular criminal terms of the Supreme Court of the State of New York, Sec. 149 subd 2 Judiciary Law is, likewise, facially violative of the equal protection of the laws guaranteed by the 5th and 14th Amendments of the Constitution. (*Hill v. State of Texas*, 316 U.S. 400).

By mandating that all defendants must apply exclusively to the Extraordinary Special and Trial Term of the Supreme Court with respect to all critical preliminary motions and pre-trial proceedings, the appellant and all other similarly situated have been selectively deprived of fundamental procedural rights flagrantly violative of due process of law and have been irreparably injured thereby. By amending the statute subsequent to the decision in *People ex rel SL & T Co.*, and in *Reynolds v. Cropsey, supra*,—which had previously construed and had upheld this very identical statute, in its preamended form, as one which did not "diminish the rights of litigants", and further holding that "it is a term of the Supreme Court with the same jurisdiction that belongs to any other term."—the statute was rendered repugnant to the due process clause of the Constitution.

Above all, in stark contrast to all other litigants in the regular criminal terms of the Supreme Court, who are sanctioned to bring all pre-trial motions and proceedings before a separate and independent Justice presiding at Criminal Term, the appellant and all others similarly circumstanced at the bar of the appellee Court are severely restricted by the limitations contained in Sec. 149, subd. 2 of the Judiciary Law (App. B) requiring that all

such motions be made returnable in the Extraordinary Term alone.

Among these vital pre-trial proceedings are motions for suppression hearings, change of venue, disqualification of the presiding judge for bias; motions to dismiss an indictment for insufficiency of evidence, denial of speedy trials or on various other procedural, jurisdictional and constitutional grounds. Especially applicable to appellant is a motion to dismiss the indictment in the interest of justice for prosecutorial misconduct shocking to the conscience, and for a hearing thereon, as provided by Article 210 New York Criminal Procedure Law. All other litigants in the criminal terms have the absolute right to a determination of pre-trial proceedings by a Judge regularly assigned by the Appellate Division, rather than by a judge personally hand-picked by the Governor, instantly replaceable by Executive fiat even within the same term.

Again, in sharp contrast to the fixed general rule in the Appellate Division that "a motion or proceeding will be deemed submitted to the court without oral argument", all other defendants at the bar of the regular criminal terms of the Supreme Court are by court rule granted the important right to argue orally all contested motions. (Rules Sec. 670.3(b) Supreme Court Rules Kings County, 22 NYCRR, Sec. 752.11. Here, appellant had been denied a fair and equal opportunity to argue his original motion to that Court submitted under color of Section 149 subd. 2 of the Judiciary Law.

It will be noted that even in a meritorious application to disqualify the presiding justice for bias or interest, there would be no other justice to take his place, for there is but a single judge appointed by the Executive to preside in the Appellee Court, the Extraordinary Term of the Supreme Court. To replace that justice for bias or interest would necessarily entail that the Governor designate an alternate judge in his place by new executive order in each such case, thus superimposing a serious practical road block in the path of any defendant at the bar of the Extraordinary Term, to the equal protection of the

laws, as compared to all other defendants within the jurisdiction of the regular criminal terms of the Supreme Court.

As to the alternate discretionary right of any defendant to apply to the Appellate Division for permission to file a pre-trial motion or proceeding, authorized by Sec. 149 Judiciary Law, subd 2, it is hornbook constitutional law that a grant of discretion is no fair or adequate substitute for the absolute right accorded all other defendants in the regular criminal terms to institute all pre-trial proceedings at an independent term. "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion" (*Roller v. Holly*, 176 U.S. 398, 409).

Even on the trial level, the fundamental right to waive a jury trial and to submit the critical issues of guilt or innocence to the trial judge as trier of the facts as well as the law, has been seriously compromised in a court so unconstitutionally structured as to tilt the balance against appellant, and all other similarly situated.

Graphically illustrative is this very case where the Appellate Division has already determined from inspection of the grand jury minutes that "the theory underlying the charge of grand larceny is thin, and the proof in regard thereto quite tenuous."

With the utmost deference and respect for the esteemed appellee Judge John M. Murtagh, the special warrantability of waiver of jury trial here present would be contraindicated, nonetheless, under the unique situation engendered by the subtle pressures of interest flowing from the unconstitutional statute at bar. "The history of American freedom is in no small measure the history of procedure." (*Malinski v. New York*, 324 U.S. 401, 419)

III

The Governor's personal designation of appellee Nadjari to manage and conduct all proceedings in the Extraordinary Term,

particularly in a court where the presiding justice had been likewise personally designated and appointed by the Governor, rendered Section 63 of the Executive Law and Executive Order No. 58, issued thereunder, unconstitutional and void, as applied.

The personal designation of the prosecutor by the Governor infinitely compounded the threat against the independence of the judiciary, by arrogating unto the Executive, likewise, the constitutional functions of the quasi-judicial, independently-elected office of appellee Attorney General of the State of New York (Article 5, Sec. 1 New York State Constitution), and flagrantly violated the specific mandate of Section 63 of the Executive Law of New York that the Attorney General "attend in person, or by one of his deputies" before the Extraordinary Term.

It is no mere coincidence that, under goad of a court structure so wholly controlled by the Executive, that an abnormal number of defendants at the bar of the appellee court have been compelled to interpose special defenses charging appellee Nadjari with wilful entrapment, subornation of perjury, prosecutorial misconduct shocking to the conscience, refusal to arraign defendants at any time following arrests, and notoriously unfair trial tactics. (See *United States v. Archer*, 486 F.2d 670 (CA2); *People v. Steinman*, 44 App. Div. 2d 839 (2d Dept. 1974); *Matter of Klein v. Murtagh*, 44 App. Div. 2d 465 (2d Dept. 1974); *In People v. Rao*, 46 App. Div. 2d 343 (2d Dept. 1975), the Court unequivocally remarked of appellee Nadjari: "Such a perversion of the criminal justice system by an overzealous prosecutor is illegal, outrageous and intolerable and we condemn it." Confirmatory thereof, federal Judge McMahon recently characterized appellee Nadjari's mispractices as "foul, illegal and outrageous." (*Rao v. Nadjari*, —— F Supp ——, USDC, SD N.Y. (October 2, 1975).

The source and fount of appellee Nadjari's gross prosecutorial misconduct practiced in the case at bar—including, among other elements, the wilful and deliberate suppression of vital

exculpatory evidence before the grand jury, and an illegal arrest without probable cause—stems, seed and root, from the Governor's personal control and direction over the judicial machinery of the Extraordinary Term court, under the presumed authority of Sections 149 subds 1 and 2, Judiciary Law and Section 63 Executive Law as applied. By every rule of logic, these unconstitutional statutes have inevitably tended to invite, provoke and condone the very outrageous practices manifested here and in a host of other cases, as reflected in a proliferating number of reported decisions. A statute may be deemed unconstitutional as applied (*Steffel v. Thompson*, 415 U.S. 452, ff. 7 (1974); *Watson v. Buck*, 313 U.S. 387); *Comm. of Mass. v. Mellon*, 262 US 447).

IV

To permit a prosecutor to engage in an *ex post facto* prosecution of this nature would directly undermine the fundamental independence of the judiciary with respect to the traditional official relationship subsisting between a judge and his law assistant in the regular performance of judicial duties, upon which this appellant and all other judges in the unified court system have relied. If this appellant be rendered retroactively vulnerable to the harassment and threat of a criminal prosecution over a matter strictly within the exclusive jurisdiction of the judiciary, then every judge or his law assistant in the land could be no less in jeopardy at the hands of a wilful and malicious prosecutor. Every judge and his law assistant would be hostage to the design of an ambitious, overzealous or tyrannical prosecutor. A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the 14th Amendment. (*City of St. Petersburg v. Alsup*, 238 F.2d 830, cert. den. 353 US 922).

A law that makes an action done before its enactment criminal, and which was innocent when done, is *ex post facto*. *Calder v. Bull*, 3 U.S. 386 (1798); *Bouie v. Columbia*, 378 U.S.

347, 353 (1964); *United States v. Nill*, 518 F 2d 793 CA 5, 1975). The criminal statutes of grand larceny and conspiracy, as here applied against appellant, are clearly invalidly retroactive and an *ex post facto* exercise of jurisdiction. *Williams v. United States*, 179 F.2d 644, aff. 341 US 70; *Love v. Fitzharris*, 460 F2d 382, vacated 409 US 1100).

"*** Due process questions under the Federal Constitution may be presented either by the failure of a state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process". (*Field v. Boyle*, 503 F. 2d 774 (CA 7, 1974).

V.

The judgment appealed from herein is a final judgment within the meaning of 28 U.S.C. 1257 (*Gospel Army v. Los Angeles*, 331 U.S. 543, 548; *Dept. of Banking v. Pink*, 317 U.S. 264, 268; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72).

Notwithstanding that the constitutional validity of the state statutes here in issue are now technically pending before the appellees Judge Murtagh and his Extraordinary Term of the Supreme Court as aforestated, it is plain that appellant's contentions as to the facial invalidity of Section 149 Judiciary Law go to the very jurisdiction of the unconstitutionally structured Court. If this statute is inherently violative of the independence of the judiciary, then the appellee Court is utterly without jurisdiction or legal competence to resolve the issue of constitutionality or otherwise as a legally constituted Court (*Oakley v. Aspinwall*, 3 N.Y. 547; *Wilcox v. Royal Arcanium*, 210 N.Y. 370, 377; *People v. Whitridge*, 144 App. Div. 493 (N.Y. 1st Dept). The one and only Court properly exercising jurisdiction or legal capacity was the Appellate Division of the Supreme Court below, to which appellant had vainly addressed the proceeding appealed from herein.

In practical terms as well, it would be patently incongruous to beseech the appellees Judge Murtagh and Extraordinary Term

of the Supreme Court for a ruling which would enseal the invalidity of the Court's own very existence, and pronounce its own nullity as a legally constituted court; "There can, of course, be no valid prosecution and conviction for crime unless the court in which the prosecution is instituted or carried on is legally created and constituted, or is at least a de facto court." (*22 Corpus Juris Secundum 108, pp. 299-300*).

CONCLUSION

It is respectfully submitted that the constitutional questions presented by this appeal are so substantial and are of such grave public importance as to require plenary consideration with Briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

AARON NUSSBAUM
Counsel for Appellant
Office & P.O. Address
16 Court Street—Suite 1505
Brooklyn, New York 11241

October 21, 1975.

I. EDWARD POGODA
Of Counsel
Office & P.O. Address
50 Court Street
Brooklyn, New York 11201

Appendix

APPENDIX A
AMENDED NOTICE OF APPEAL

APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT
SUPREME COURT OF THE STATE OF NEW YORK

In the Matter of
FRED G. MORITT,

Appellant

-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT, COUNTY OF KINGS, HON. JOHN M. MURTAGH, AS PRESIDING JUSTICE OF THE EXTRAORDINARY SPECIAL AND TRIAL TERM, HON. MAURICE H. NADJARI, AS SPECIAL DEPUTY ATTORNEY GENERAL, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK

Notice is hereby given that Fred G. Moritt, appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Division, Second Judicial Department, Supreme Court of the State of New York, entered December 27, 1974, which dismissed on the merits the petition of the appellant drawing into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States; and from the final order and judgment of the Court of Appeals of the State of New York, entered June 4, 1975 dismissing the appeal therefrom, and from the final order and judgment of the Court of Appeals entered September 10,

1975 denying leave to appeal therefrom.

This appeal is taken pursuant to 28 USC Section 1257(2).

Dated: September 29, 1975

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for Appellant
Office & P.O. Address:
16 Court Street
Brooklyn, N.Y. 11241

TO: HON. MAURICE H. NADJARI
Special Deputy Attorney General
2 World Trade Center
New York, N.Y. 10047

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
2 World Trade Center
New York, New York 10047

HON. JOHN M. MURTAGH
Presiding Justice,
Extraordinary Special and Trial Term
of the Supreme Court
100 Centre Street
New York, New York 10013

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 1975, copies of the within Amended Notice of Appeal were mailed, postage prepaid, to the foregoing parties to their respective addresses herein above set forth.

All parties required to be served have been served.

Dated this 29th day of
September, 1975

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for Appellant

APPENDIX A
NOTICE OF APPEAL

(TITLE)

NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Fred G. Moritt, petitioner-appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered September 10, 1975, denying leave to appeal to the Court of Appeals from the final judgment of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York entered December 27, 1974, which dismissed on the merits the petition of the petitioner-appellant in the Appellate Division herein drawing into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States.

This appeal is taken pursuant to 28 USC Section 1257 (2).

Dated this 25th day
of September, 1975

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for petitioner-
appellant

CERTIFICATE OF SERVICE

I hereby certify that this 25th day of September, 1975, copies of the within Notice of Appeal were mailed, postage prepaid, to their respective addresses herein above set forth.

HON. MAURICE H. NADJARI
Special Deputy Attorney General
Attorney for Appellee-Respondents, pro se
and Extraordinary Special and Trial Term
of the Supreme Court
2 World Trade Center
New York, N.Y. 10047

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
2 World Trade Center
New York, N.Y. 10047

HON. JOHN M. MURTAGH
Presiding Justice
Extraordinary Special and Trial Term
of the Supreme Court
100 Centre Street
New York, N.Y. 10013

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for petitioner-
appellant

Dated this 25th day of
September, 1975

APPENDIX A
JUDGMENT OF APPELLATE DIVISION
SECOND DEPT.,
SUPREME COURT OF THE STATE OF NEW YORK

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 27, 1974

HON. FRANK A. GULOTTA, Presiding Justice
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. FRED J. MUNDER Associate Justices

(SAME TITLE)

A proceeding having been instituted in this court, pursuant to article 78 of the CPLR, by the above named Fred G. Morritt, petitioner in this proceeding, (1) to prohibit respondents from proceeding with trial of indictment No. S.P.O.K.—13/1974 and (2) to dismiss the indictment:

Now, upon the papers filed in support of and in opposition to the application, and the application having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the application is hereby denied and proceeding dismissed on the merits, without costs.

Enter:

Irving N. Selkin
Clerk for the Appellate Division

APPENDIX A
ORDER OF NEW YORK COURT OF APPEALS
DISMISSING APPEAL

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the Fourth Day of June, A.D. 1975.

PRESENT, HON. CHARLES D. BREITEL
Chief Judge, presiding.

(SAME TITLE)

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved (CPLR 5601[b][1]).

s/Joseph W. Bellacosa
Clerk of the Court

APPENDIX A
ORDER OF COURT OF APPEALS
DENYING REARGUMENT

At a session of the Court, held at Court of Appeals Hall
in the City of Albany on the Tenth Day of September
A.D. 1975

PRESENT, HON. CHARLES D. BREITEL
Chief Judge, Presiding

(SAME TITLE)

A motion for reargument of a motion to dismiss the appeal taken as of right to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

s/Joseph W. Bellacosa
Clerk of the Court

APPENDIX A
ORDER OF NEW YORK COURT OF APPEALS
DENYING LEAVE TO APPEAL

At a session of the Court, held at Court of Appeals Hall
in the City of Albany on the Tenth day of September
A.D. 1975

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge, presiding

(SAME TITLE)

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

/s/ Joseph W. Bellacosa
Clerk of the Court

APPENDIX B
NEW YORK STATE CONSTITUTION

Article 6, Sec. 27 Constitution of the State of New York

(McKinney's Consolidated Laws of New York, Book 2).

"*Section 27 (Extraordinary terms of the Supreme Court)*:

> The Governor may, when in his opinion the public interest requires, appoint extraordinary terms of the Supreme Court. He shall designate the time and place of holding the term and the justice who shall hold the term. The governor may terminate the assignment of the justice and may name another justice in his place to hold the term."

Article 6, Section 28, Constitution of the State of New York (McKinney's Consolidated Laws of New York, Book 2).

"*Sec. 28, Administrative Supervision of the Courts*

"The authority and responsibility for the administrative supervision of the unified court system for the state shall be vested in the administrative board of the judicial conference. The administrative board shall consist of the chief judge of the court of appeals, as chairman, and the presiding justices of the appellate divisions of the four judicial departments. The administrative board, in consultation with the judicial conference, shall establish standards and administrative policies for general application throughout the state. The composition and functions of the judicial conference shall be as now or hereafter provided by law. In accordance with the standards and administrative policies established by the administrative board, the appellate divisions shall supervise the administration and operation of the courts in their respective departments."

STATUTES OF STATE OF NEW YORK

Section 86 Judiciary Law. (McKinney's Consolidated Laws of New York, Book 29)

Section 86. Designation by appellate division of special and trial terms of the supreme court.

> "The justices of the appellate division in each department shall have power to fix the times and places for holding special and trial terms of the supreme court held therein, and to assign the justices in the departments to hold such terms; or make rules therefor; and may from time to time make additional appointments and designations, or change or alter those already made. ***"

Section 87 Judiciary Law. (McKinney's Consolidated Laws of New York, Book 29(.

Section 87. Rules appointing terms must be signed and filed.

> The rules made by the justices of an appellate division for fixing the times and places for holding special and trial terms, must be signed by the justices making them, and immediately filed in the office of the secretary of state; and a duplicate thereof must also be filed in the office of the clerk of such appellate division.

Section 88 Judiciary Law. (McKinney's Consolidated Laws of New York, Book 29).

Section 88. Designation by presiding justice of appellate division of justice to hold term of supreme court.

> If it appear to the satisfaction of the presiding justice of the appellate division in any department that a special or trial term of the supreme court duly appointed therein is in danger of failing, he may designate a justice who resides in that department to hold such term in the absence of the justice assigned thereto. If in the opinion

of such presiding justice it is not practicable to make a designation from his department, he shall inform the governor who may thereupon designate for such term a justice from any department. L.1909, c. 35; formerly §86, renumbered 88, L.1945, c. 649, §42, eff. April 9, 1945.

Section 149 of the Judiciary Law, subd. 1. (McKinney's Consolidated Laws of New York, Book 29).

Section 149. Governor may appoint extraordinary terms and name justices to hold them.

1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term. ***"

Section 149 Judiciary Law, subd. 2. (McKinney's Consolidated Laws of New York, Book 29)

"2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Section 212 Judiciary Law (McKinney's Consolidated Laws of New York Book 29).

"Sec. 212. Functions of the administrative board.

The administrative board shall have the authority and responsibility for the administrative supervision of the unified court system. In discharge of that authority and responsibility the administrative board, in consultation with the judiciary conference, may adopt, amend, rescind and make effective standards and policies for general application throughout the state, including but not limited to standards and policies relating to the following administrative powers and duties:

1. Personnel practices, title structure, job definition, classification, qualifications, appointments, promotions and reinstatements, performance rating, sick leave, vacations, time allowances and removal of non-judicial personnel of the unified court system. ***".

Section 63 Executive Law. (McKinney's Consolidated Laws of New York Book 18).

Section 63. General Duties. The Attorney General shall:

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorneys or counsel, in order to protect the interests of the state ***.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the Supreme Court or appear before the Grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement ***."

Civil Practice Law and Rules Sec 5601 (b) (McKinney's Consolidated Laws of New York, Book 7B).

Sec. 5601. Appeals to the court of appeals as of right.

(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

Civil Practice Law and Rules Sec. 5602 (a) (McKinney's Consolidated Laws of New York, Book 7B).

Section 5602. Appeals to the court of appeals by permission

(a) *Permission of appellate division or court of appeals.* An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or ***"

Executive Order No. 58 (9 Official New York Codes Rules and Regulations, Sec. 1.58)

Executive Order No. 58: [*Placing requirement on Attorney General in relation to certain crimes committed by public servants in the County of Kings*]

TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW YORK
STATE CAPITOL
ALBANY, NEW YORK

"I. Pursuant to article IV section three of the constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of Kings at the County Court House and any other term or terms of the Supreme Court in and for the County of Kings, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:

(a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of Kings in violation of any

provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public servant arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(c) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment pursuant to or connected with this requirement;

and that you conduct, manage, prosecute and handle such other proper actions and proceedings relating thereto as may come before said court and that you conduct, manage, prosecute and handle all trials at said extraordinary term of court or at any term of said court at which any and all indictments which may be found and which may hereafter be tried, pursuant to or in connection with this requirement, and in the event of any appeal or appeals or other proceedings connected therewith, to manage, prosecute, conduct and handle the same; and that in person or by your assistants or deputies you, as of the date hereof, supersede and in the place and stead of the District Attorney of the County of Kings exercise all the powers and perform all the duties conferred upon you by the statutes and law in such case made and provided and this requirement made hereunder; and that in such proceedings and actions the District Attorney of the County of Kings shall exercise only such powers and perform such duties as are required of him by you or your assistants or deputies so attending.

II. Pursuant to subdivision 8 of section 63 of the Executive Law, I also find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to the subjects which are within the scope of this requirement, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purposes of this requirement ***"

Executive Order No. 64 (9 N.Y.C.R.R. 1.64).

Executive Order No. 64: [Amending Executive Order No. 57 by appointing an indefinite extraordinary special and trial term of the Supreme Court to be held in the County of Kings.]

TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW YORK
STATE CAPITOL
ALBANY, NEW YORK

WHEREAS, in my opinion, the public interest requires it:

I. NOW, THEREFORE, in accordance with Article VI Section 27 of the Constitution, statute and law in such case made and provided, I do hereby appoint an Extraordinary Special and Trial Term of the Supreme Court to be held at the Kings County Supreme Court Building, 360 Adams Street, in the County of Kings on the 16th day of October nineteen hundred seventy-two, at ten o'clock in the forenoon of that day and to continue for so long as it may be necessary for the purpose of any criminal, civil or other judicial action or proceeding which may be attended by the Attorney General or by one or more of his deputies or assistants and which may be held, conducted or given thereat concerning or relating to the subjects within the scope of my executive order and requirement to the Attorney General, numbered fifty-eight and dated September nineteen, nineteen hundred seventy-two, and all amendments thereto heretofore or

hereafter promulgated, and for the purpose of conducting and handling such other proper acts, procedures, and matters relating thereto as may come before the court.

II. I do hereby designate the Honorable John M. Murtagh, a Justice of the Supreme Court of the State of New York, First Judicial District, to hold the said Extraordinary Special and Trial Term as hereinabove appointed and described and among other things to cause to be drawn according to law a grand jury or grant juries to serve the said Extraordinary Special and Trial Term of the Supreme Court.

III. I do further direct that copies of the notice of the appointment and the designation hereinabove made and provided for shall be released and distributed to the general press.

Signed: Nelson A. Rockefeller
Dated: October 13, 1972